FILE COPY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 88.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
Clerk.

U. X. GUNTER, JR., ATTORNEY GENERAL OF THE STATE OF SOUTH CAROLINA, ET AL.,
APPELLANTS,

vs.

THE ATLANTIC COAST LINE RAILROAD COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF SOUTH CAROLINA.

ARGUMENT OF STEVENSON & MATHESON FOR APPELLANTS.

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STATEMENT.

The Cheraw & Darlington Railroad Company was chartered by the Legislature of South Carolina on December 19th, 1849, as follows.

I. Be it enacted by the Senate and House of Representatives, now met and sitting in General Assembly, and by the authority of the same, That for the purpose of establishing a communication by Railroad from Cheraw to some point on the Wilmington and Manchester Railroad in the District of Darlington, the formation of a corporate company is hereby authorized, to be called the Cheraw and Darlington Railroad Company, which company, when formed in compliance with the conditions hereinafter prescribed, shall have corporate existence as a body politic in this State.

II. That said company is hereby authorized to con-

struct a railroad from the town of Cheraw to some point on the Wilmington and Manchester Railroad, in the District of Darlington, by a route to be determined by said company afer the same shall have been formed.

III. Provides for opening books.

IV. That when the sum of one hundred and twenty- five thousand dollars shall be subscribed for, in manner herein prescribed the subscribers shall be, and they are hereby, declared to be incorporated into a company, by the name and style of the Cheraw and Darlington Railroad Company and may meet and organize the said company at such time and place as may be designated by a majority of the commissioners herein named for the town of Cheraw.

V. That for the purpose of organizing and forming this company all the powers conferred by the charter of the Wilington and Manchester Railroad Company on the commissioners therein named, shall be vested in the commissioners hereby appointed in the town of Cheraw; and all the powers, rights and privileges granted by the charter of the Wilinington and Manchester Railroad Company to that company, shall be, and are hereby, granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained, except as to the amount of the capital stock, the amount of shares and the sum necessary to authorize organization, and except in so far as the special provisions of this Act may otherwise require the same to be modified or varied.

In the Senate House the nineteenth day of Dec. in the year of our Lord one thousand eight hundred and forty nine, and in the seventy-fourth year of the Sovereignty and Independence of the Uunited States of America.

ANGUS PATTERSON,
President of the Senate.

JOHN IZARD MIDDLETON,
Speaker House of Representatives.

See folio 96, Statutes of S. C. at Large, Vol. XI page 367. And the fifth section, the power clause was amended on December 17th, 1863, by striking out the words "Wilmington & Manchester" and inserting the word "Northeastern"

See folio 96, page 58 and Statutes of S. C, at Large, Vol. XIII, page 219.

So that said section now reads:

I. Be it enacted by the Senate and House of Represen tatives, now met and sitting in General Assembly, and by the authority of the same, That section five of an Act, entitled "An Act to charter the Cheraw and Darlington Railroad Company, ratiffed the nineteenth day of December, in the year of our Lord one thousand eight hundred and forty-nine, be amended so as to read as follows, to-wit: That all the powers, rights, and privilegs granted by the charter of the Northeastern Railroad Company, are hereby granted to the Cheraw and Darlington Railroad Company, and subject to the conditions therein contained, except as to the amount of capital stock, and except in so far as the special provisions of this Act may otherwise require the same to be modified or varied."

The road provided for in the charter had completed been and put in operation in 1855, see folio 34, page 21.

Soon thereafter the exemption from taxation enjoyed by the Northeastern Railroad Company was also claimed by the Cheraw & Darlington Railroad Company under the contention that under the term "all the powers, rights and privileges," the Cheraw & Darlington Railroad Company was entitled to exemption from taxation enjoyed by the Northeastern Railroad Company. This is denied by the Appellants, who contend that the conferring of the rights, powers and privileges of one corporation upon another does not confer an immunity from taxation enjoyed by the first corporation upon the second corporation but some broader term must be used. This is contention Number 1.

II. In 1870, Thomas E. B. Pegues instituted a proceeding in the Circuit Court of the United States for South Carolina to restrain the treasurers of Darlington and Chesterfield Counties from collecting taxes assessed against the property of said Railroad Company. He alleged, folio 49, page 30, in the face of truth of history, that subsequent to the Act of 1863 the said road was built, setting up the alleged exemption from taxation and claiming the building

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Citation.

Filed Aug. 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except The Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

U. X. GUNTER, JR., as Successor in Office to G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, Appellants,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

To I. P. Mangum, treasurer for Chesterfield county; W. H. Lawrence, treasurer for Darlington county, and C. S. Lucas, as successor to J. O. McLendon, treasurer for Florence county.

You are hereby summoned to be and appear before the judges of the Supreme Court of the United States at the Capitol at Washington, D. C., on the 22nd day of August, next, and *and* then
124 and there to join with U. X. Gunter, Jr., as successor in office to G. Duncan Bellinger, as attorney general of South Carolina; W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, as counsel employed by the State, in prosecuting an appeal from the decree of this court granting a perpetual injunction against you and the said G. Duncan Bellinger, as

attorney general, W. F. Stevenson, D. S. Matheson, J. M. Spears, and S. W. G. Shipp, as counsel employed by said State; and also that you do within thirty days from service file and cause to be filed with the clerk of the circuit court for said district a notice of severance if you do not desire to be joined with the said U. X. Gunter, Jr., as successor to G. Duncan Bellinger, as attorney general of South Carolina, W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, as an appellant in the prosecution of said appeal.

Witness the Honorable Nathan Goff, one of the judges of the circuit court of the United States of America, in and for the district and circuit above named at Clarksburg, West Virginia, the 23d day of July A. D., 1904, and in the one hundred and twenty-ninth year of the sovereignty and Independence of the United States of America.

NATHAN GOFF,
Judge of the Circuit Court of the United States for the
Eastern District of South Carolina, in the Fourth Circuit.

We acknowledge due service hereof.

W. H. LAWRENCE,
Treas. for Darlington County.
C. S. LUCAS,
Treasurer for Florence County, as Successor
in Office of J. O. McLendon.
I. P. MANGUM,
Treas. Chesterfield Co.

Filed in this office Aug. 1 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

125 Notice of Severance on Appeal

Filed August 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainants,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County, South Carolina, and J. O. McLendon, County Treasurer for Florence County, South Carolina, All of said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

I. P. Mangum, as treasurer of Chesterfield county, W. H. Lawrence, as treasurer of Darlington county, and C. S. Lucas as successor to J. O. McLendon, as treasurer of Florence county, respondents in the above proceeding, upon whom citation has been served to join with U. X. Gunter, Jr., as successor in office to G. Duncan
126 Bellinger, as attorney general, and others, as counsel employed by the State of South Carolina, appellants in prosecuting an appeal from the decree of the circuit court of the United States from the district aforesaid in the above entitled cause, hereby file in said court their notice that they do not desire to appeal from said decree; that they have no authority under the law to do anything which they are therein enjoined from doing if said decree was reversed, and they do not appeal therefrom, and they do hereby sever from their co-defendants on said appeal.

W. H. LAWRENCE,
Treasurer for Darlington County.
C. S. LUCAS,
Treasurer for Florence County, as Successor in Office of J. O. McLendon.
I. P. MANGUM,
Treasurer Chesterfield Co.

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Citation.

Filed Aug. 1, 1904.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

In re THOMAS E. B. PEGUES, a Citizen of Mississippi, Complainant,
vs.
R. I. HUMPHREYS, a Citizen of South Carolina, County Treasurer of Darlington County; John McCalla, a Citizen of South Carolina, Tax Collector for Chesterfield County, and The Cheraw and Darlington Railroad Company, a Citizen of South Carolina, Defendants.

Ex Parte: THE ATLANTIC COAST LINE RAILROAD COMPANY, a Citizen of Virginia,
vs.
G. DUNCAN BELLINGER, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, I. P. Mangum, County Treasurer for Chesterfield County, South Carolina; W. H. Lawrence, County Treasurer for Darlington County; J. O. McLendon, County Treasurer for Florence County, South Carolina, All the said Persons Except the Atlantic Coast Line Railroad Company Being Citizens of the State of South Carolina.

U. X. GUNTER, JR., as Successor in Office to G. Duncan Bellinger, Attorney General of the State of South Carolina; Stevenson & Matheson, J. M. Spears, and S. W. G. Shipp, Appellants,
against
THE ATLANTIC COAST LINE RAILROAD COMPANY, Appellee.

To the Atlantic Coast Line Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the twenty-second day of August, next pursuant, to an appeal filed in the clerk's office of the circuit court of the United States for the district of South Carolina, wherein U. X. Gunter, Jr., as
128 successor in office to G. Duncan Bellinger, as attorney general of South Carolina, W. F. Stevenson, D. S. Matheson, Stevenson & Matheson, J. M. Spears, S. W. G. Shipp, as counsel employed by the State of South Carolina are appellants, and you are appellee to show cause, if any there be, why the decrees in the said appeal mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Honorable Nathan Goff, one of the judges of the circuit court of the United States of America, in and for the district and circuit above named at Clarksburg, West Virginia, the 23d day

of July A. D., 1904, and in the one hundred and twenty-ninth year of the sovereignty and Independence of the United States of America.

NATHAN GOFF,
Judge of the Circuit Court of the United States for the Eastern District of South Carolina, in the Fourth Circuit.

Service of above citation is hereby acknowledged this 28th July 1904.

J. T. BARRON,
For Attorneys for Appellee.

Filed in this office Aug. 1 1904.

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

129 Order to Transmit Record.

"And thereupon, it is ordered by the court here that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the United States Supreme Court, and the same is transmitted accordingly."

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

130 Clerk's Certificate.

UNITED STATES OF AMERICA,
Fourth Circuit, District of South Carolina.

In the Circuit Court. In Equity.

I, C. J. Murphy, clerk of the circuit court of the United States for the district of South Carolina, do hereby certify that the foregoing 130 pages, is a true and correct copy of all the records and proceedings, in the case of *In re* Thomas E. B. Pegues, complainant, against R. I. Humphreys, *et al.*, defendants, *Ex parte* The Atlantic Coast Line Railroad Company *vs.* G. Duncan Bellinger, attorney general of the State of South Carolina, *et al.*, rendered as aforesaid, together with the decrees and all things relating to the same, as appears by the records now on file in my office.

Given under my hand and seal of said court, at clerk's office, in the city of Charleston, S. C., in the district aforesaid, this 13th day of August, A. D. 1904.

[Seal U. S. Circuit Court, District of So. Carolina.]

C. J. MURPHY,
C. C. C. U. S., Dist. S. C.

Endorsed on cover: File No. 19,457. South Carolina C. C. U. S. Term No. 88. U. X. Gunter, Jr., attorney general of the State of South Carolina, *et al.*, appellants, *vs.* The Atlantic Coast Line Railroad Company. Filed August 25th, 1904. File No. 19,457.

of said road as the consideration thereof and that it was irrepealable. The Apellants deny that any exemption was conferred and allege that if so conferred it was a mere gratuity and was repealed by the Constitution of 1868, it being admitted that the statment that the road was built after said Act of 1863, was untrue (folio 34, page 21), that fact being relied on in the opinion of this Court in Humphrey vs. Pegues, 16 Wall, 244 (See Lawyers Coop Pub Co Edition for full report) Saying,

"The case shows that from 1849 to 1863 no sufficent inducements had been found to procure the building of the Cheraw road. We are not advised what other powers and privileges were then and there conferred upon it in addition to the exemption we are considering. But this exemption was conferred; an exemption that must have been understood by the least reflecting person as being of immense value to all concerned in the road. The road was soon afterwards built, and has since then been and now is in operation. These facts serve to show; first, that there was, in this instance, the consideration that at any time exists for the granting by the Legislature of such privilege, to wit: the acceptance of the same and the building of the road; and second, the intention of the Legislature, by omitting a reference to the original Act of incorporation, to grant all the powers and privilegs that had been at any time conferred upon the Northeastern Company."

The answer of defendants in Pegues vs. Humphreys admits by failing to deny, that the road was built after 1863, and that the conferring of the "powers, rights and privileges" conferred also tax exemption of the Northeastern Company these admissions are now contested and the contention of Appellants is that the case now made by them is on a new state of facts not contested in the Pegues case and hence, if the parties were the same, the questions in litigation are different, and the causes of action being different the former adjudication does not conclude them in the present case, in which they are proceeding to collect the taxes claimed, the causes of action being different from those taxes in litigation in the Pegues case.

This is contention Number II.

III. The Atlantic Coast Line Railroad Company contend

that the State is bound by the decision in Pegues vs. Humphreys by reason of the fact that the Attorney General appeared in said case, and made his report to the Legislature. The Appellants maintain that the Attorney General had no authority to submit the rights of the State to the jurisdiction without Legislative consent and that such consent was not obtained as shown by his report (folio 43, page 26) and no ratification was made by the Legislature.

This contention being that a State can only be bound by a judgment rendered in a case where by legislative authority she submits to the jurisdiction and no suit against an officer and no submission by an executive officer of the sovereign's rights| to a court can result in a judgment binding on the State.

This is Appellants third contention.

In 1900 the Legislature of South Carolina passed an Act to assess railroad property which had been off the tax books more than a year in order to provide a means of assessment for same and directed that demand be made for said taxes when assessed and on failure of payment that the Attorney General of the State and associate counsel institute suit in behalf o', and in the name of the State to recover the same. This course was pursued and the attorneys were proceeding to have the respective rights of the State and the Railroad Company determined in the Courts of the State when the restraining order herein was granted (folio 87, page5 3.) The taxes for the year 1898 were involved and it was admitted at the hearing that all claim of exemption expires July 18th, 1898, and no taxes were paid for that year (fol I10, p. 67) and that the State has the right to proceed to collect taxes for the part of the year from July 18th, 1898, to December 31st, 1898.

IV. That there is plain and adequate remedy at law and no trespass contemplated or attempted and equity could not interfere.

V. That there was admittedly part of the tax due and it had not been tendered and therefore equity will not restrain the suit.

VI. That the Appellants were merely attorneys for

the State without personal interest in the cause and to enjoin the State's attorneys from testing its rights in the Court is in effect to enjoin the State itself and this Court is without power to do so under the constitution and laws of the United States. The Circuit Judge enjoined all officers and attorneys for all time from proceeding to prosecute the State's suit, thereby effectually barring the State from ever testing such rights as it may have in any court.

ASSIGNMENT OF ERRORS.

The errors assigned are as follows:

I. The Court erred in holding in effect that the conferring of the "rights, powers and privileges" of the Northeastern Railroad Company on the Cheraw & Darlington Railroad Company, conferred the exemption from taxation of the one on the other, whereas, it takes some broader term to give the exemption.

II. That the Court erred in not holding that the action in the State Court, enjoined in this proceeding, was on different causes of action from those set forth in Humphreys vs. Pegues, and new and different questions were raised, to wit: The question of the consideration for the alleged contract by building the road after the act 1863, and the question of whether the words "all rights, powers and privileges" carried an exemption from taxation, and these questions were not adjudicated by the decree in Humphreys vs. Pegues.

III. That the Court erred in holding in effect that the State and her attorneys were bound by the judgment in Humphreys vs. Pegues, when she never submitted to the jurisdiction; was no party to the cause and could not be bound by any office unless Legislative consent had been given and the Court in that case had no jurisdiction to bind the State.

IV. That the Court erred in not holding that there was plain and adequate eemedy at law, in as much as no trespass was threatened, and no interference with petitioner's business contemplated, and the only peoceeding contemplated was an action at law in which all defences relied on on by petititner here were available.

V. The Court erred when it was admitted that part of the tax was due and had not been tendered, in not dismissing the petition.

VI. That the Court erred in ejoining the State's attorneys and all parties being associated with them, in that it thereby enjoined the State as effectually as if the injunction had been made against the State in so many words, and this it had no power to do.

ARGUMENT.

The contentions set forth in the above statement, around which all the questions raised in the appeal are grouped are six.

I, That conferring the "powers, rights and privileges" of the Northeastern Railroad Company, upon the Cheraw & Darlington Railroad Company did not confer an exemption from taxation enjoyed by the former on the latter.

On this question this Court has spoken in explicit terms in several cases and these terms will not includean immunity from taxation unless other terms of the Statute remove all doubt as to the intention to con'er the immunity:

In the case of the Phoenix, Fire and Marine Insurance Co. vs. Tennessee, 16 Sup. Ct. Rep. 471, 161. U. S.

"All the rights and privileges" of one Co. was conferred upon another by Statute. The first Company had an immunity from taxation. The second Company contended that it acquired it. The court says it must always be borne in mind in construing language of this nature that the claim for exemption must be made, wholly beyond doubt, for, as stated by Justice Harlan in Railroad Company vs. Gregory, 120 U. S. 569, 7 Sup. Ct. Rep. 693, it is the settled doctrine of this Court, that an immunity from taxation by a State will not be recgonized unless granted in terms too plain to be mistaken. See also Alsobrook vs. Railroad Co., 146 U. S. 279, 13 Sup. Ct. 72, and in such case the existence of a well founded doubt is equivalent to the denial of the claim. "The Court goes on to say further. "That it cannot be doubted that the decisions of this Court are somewhat involved in relation to this question of exemption." It then cites the cases of Keokuk

& W. Railroad Company against Mo. 152, U. S. 301, 14 Sup. Ct. 592, Railroad Co. vs. Miller, 114, U. S. 176 Sup. Ct. 813, Morgan vs. La. 93 U. S. 217, L. C. Bk. 23p. 860, Memphis & L. R. R. R. Co. vs. Railroad Comsrs. 112 U. S. 609, 5 Sup. Ct. 299, and Picard vs. Railroad Company, 130 U. S. 637, 9 Sup Ct. 640, as holding that the grant ofan exemption to one corporation cannot be extended by conferring its "rights, powers and privileges upon another Company, to the second Company."

Then it cites the case of Humphreys against Pegues, 16 Wall, 244, as on the otherside and does not attempt to reconcile it. The fact being that they didn't have the record before them or they would have seen that the exemption was conceded to pass under the word privilege in that case. Hence the Court did not adjudicate it at all.

Then the case of Tennessee vs: Whiteworth is cited on that side but they conclude that the intention to grant the exemption was plainly shown from the general trend of all the statutes. So neither case is irreconcilable with the decision reached by the Court. In Humphrey vs. Pegues the question was conceded, and in Tenn. vs. Whiteworth the statutes themselves showed clearly the intention. They conclude after citting the authorities on both sides as follows.

"The later cases of Picard vs. Railroad Co. supra, and Railroad Co. vs. Alsobrook, supra, shows that there must be other language than the mere word privilege or other provisions in the statute removing all doubt as to the intention of the Legislature, before the exemption will be admitted. If this were an original question we should have no hesitation in holding that the plaintiff in error did not acquire the exemption from taxation claimed by it, and we think at the presnt time the weight of authority, as well as the better opinion, is in favor of the same conclusion which we should otherwise reach. This seems to us to settle the question here. There is no additional word used in statute, and there is nothing in the statute indicating an intention to exempt the property of the defendant. In R. R. Co. vs. Alsobrook 13 Sup. Ct. p. 76 we find the following. "The taxing power is essential to the existence of the goverment, and cannot be held to have been relin-

quished in any instance, unless the deliberate purpose of the State to that effect clearly appears; the surrender of a power so vital cannot be left to inference, or conceded in presence of doubt, and, when the language used admits of reasonable contention, the conclusion is inevitable in favor of the reservation of the power." See same case 14 S. E. R. 652.

In Tucker vs. Fergson 22 Wall, 527, L. R. Rep. book 22, p. 805 at page 816, the Court says. "The statute exempting thle auds is not a contract. We therefore contend that no such exemption as it claimed was ever conferred and that it would be a great wrong to enforce by a legal fiction a right which was never granted and take from a Soverign State one of her attributes of soverignty with which she has never parted."

The consideration for the alleged contract, to-wit the building of the road in pursuance of the same, being now admiited to be a myth, the exemption if granted, was a gratuity and was repealed by the Constitution of 1868, and as only litigated questions are res judicata in a subsequent suit on the new cause of action, and as the consideration of the contract and its existence was not contested in Pegues case, we are at liberty to make these questions.

There can be no contract without a consideration and in this case there was no consideration. See Cooley Coust. Lim. p. p. 149 and 335, also the case of Grand Lodge vs. State 17 Sup. Ct. Rep. 523.

There the Masons bought property in 1853. In 1855 an act was passed exempting it from tax so long as the Masons occupied it. In 1879 the State adopted a new constitution which contained the following: "The following property shall be exempt "from taxation and no other," and and the particular class of property here exempted was not included. The acition was brought to enjoin the collection of taxes thereon. It was held that it was a mere gratuity which was without consideration and might be revoked at pleasure, and that it had been so done. In the case of Christ Church vs. Philadelphia. 24 How 300, it was held that the gift was "beneplacitum" and could be evoked

by the Legislature. (Read.) So in Tucker vs. Furguson, 22 Wall, 527, L. R. Rep. book 22, p. 805 at page 816, the Court says: The statute exempting the lands is not a con. tractfor the following reasons. There was noconsideration.

The Company was required to do nothing, and did nothin return. As between individuals the stipulation would belong to the category of nude pacts. "It has no higher character becaus one of the parties was a State, the other a corporation, and it put in the form of a statute. It was the promise of a gratuity spontaneously made which might pe kept changed or recalled at pleasure. "So in Wisconsin R. R. Co. vs. Board Supervisors, 93, U. S.. 595. When the same doctrine is held and the court says: "In such cases a reasonable doubt is fatal to the claim." (Exemption) "Prima facie every presumption is against it." The same doctrine is fully stated in Newton vs. Commissioners, 100 T. S. 7e0. So if the Act of 1863 passed an exemption it was a gratuity. The road owned the property then in the fix it is now. The gratuity could be revoked at will, and this had been done. Sec. 2, Art. 12, of Constitution of 1868 provides as follows: "Property of Corporations now existing or hereafter created shall be subject to taxation, except as in cases otherwise provided for in this constitution. Sec. 1. Art. 9, also covers all property exempted as follows: "Munipal, educational, literary, scientific, religious or charitable purposes." No other matters are exempt. This therefore repeals exemptions which are not contracts. It is so held in Tomlinson vs. Jessup, 15 Wall. 454.

2. As to Res. Adjudicata. The case of Humphreys vs Pegues, 16 Wall, 244, decided only one question. The court says: "The bill contains many details which it is not necessary to state. "Upon the arguments of the counsel and the briefs submitted, but a single question is presented for the consideration of this Court." "The stockholders of the Cheraw & Darlington Co. contend that the act last mentioned, (Act of 1885 amending N. E. R. R. charter) formed a part of the Charter of the Northeastern Company in 1863 when the privileges conferred upon that Company were granted to the Cheraw & Darlington Company. The State contends that the priviloges thus granted were

limited to those conferred upon the Northeastern by its original charter, or act of incooporation passed in 1851." There is nothing in the terms of the statue of 1863 to indicate that the Legislature intended to limit the privileges conferred upon the Cheraw Company to those granted to the Northeastern Company, by its original actof incorporation, and to exclude the important privileges contained in the amending act. "The Court then decides as the only question in the case that the act conferred all all privileges held by the Northeastern under the acts of 1851 and 1855. It was a fact conceded that the Cheraw & Darlington Railroad was not built prior to 1863," and it was not questioned that the word privileges would confer an exemption contained in the act of 1855, if that act's privileges were intended by the Legislature, and it was not claimed that the constitution of 1868 repealed the exemption if one existed.

Thus these questions were not litigated on which we rely, (1) The road was not built pursuant to the exemption, (2) Therefore it was no contract and repealable, (3) The word "privileges" in a statute making another statute enforcable does not carry the exemption contained in that statute. These positions we rely on and they were not litigated in Humphrey vs. Pegues. Now these points were not litigated before. Can we be estopped because they might have been litigated? To get at the question we will first settle the question of whether this is the same cause of action in contest in that case. This is a suit for taxes for different years from that.

The United States Supreme Court held in Keokuk & W. R. Co. vs. Missouri, that taxes for different years are different causes of action. 14 Sup. Ct. Rep. 597, this is followed in Phoenix F. & M. S Co. vs. Tennessee, 16 Sup. Rep. 475 and other cases, and cannot be questioned on principle. In the case just cited the Court says "A suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action. If there were any distinct question litigated and settled in the prior suit, the decision of the Court upon that question might raise an estopped in another suit upon the principle stated in Cromwell vs. Coun-

ty, of Sec. 94, U. S. 351, but as was held in that case, where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estopped only as to those matters in issue or points controverted upon the determination of which the finding or verdict was rendered." The question to be settled therefore, must have been actually litigated and settled when the parties are the same, but the causes of action different, i. ei. taxes for different years. That case of Keokuk & W. R. vs. Missouri, grew out of the following facts: The Alexandria & Bloomfield Railroad Company was chartered Feb. 9, 1857, with a tax exemption of 20 years from its completion. It was completed in 1872. It was authorized to consolidate with a road in Iowa under a State statute which provided that such consolidated roads "shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State as if the consolidation had not taken place." Said road whose name had been changed to the Alexandria & Nebraska City R. R. Co., consolidated with the Iowa Southern, an Iowa corporation, under the name of the Missouri, Iowa and Nebraska R. R. Co., and the same had been sold under foreclosure and bought by Keokuk & Western, Aug. 19, 1886. The State of Missouri brought suit against the Missouri, Iowa and Nebraska Co. in 1873 for taxes for 1872, and the exemption granted the Alexandria and Bloomfield charter was claimed and sustained by the Court. In 1881, one Secor, a stockholder, also brought an action and obtained an injunction against the county officers collecting the taxes. This suit was brought by the State of Missouri to collect taxes due on said road for 1886, levied while the property of the Missouri, Iowa and Nebraska Co. and make them a lien on the road in the hands of the Keokuk and Western. The former judgment between Missouri & the M. I. & N. Co. was pleaded as estopped. The Court says in considering that question." It was considered in that case that the Missouri, Iowa and Nebraska Railway Company had succeeded to all the privileges and liabilities of the Alexandria and Bloomfield Co."

"The question upon which the case now under consideration was subsequently decided, namely, that the Mis-

souri, Iowa and Nebraska Railway Company did not succeed to the exemption from taxation provided in the original charter of the Alexandria and Bloomfield Company, was not discussed in that case, since the exemption was conceded to enure to the latter company," nor did the judgment in that case establish a rule of property upon which the plaintiff was entitled to rely, and upan the faith of which it claims to have purchased the road, namely, the right of the Missouri, Iowa and Nebraska Railway to the exemption in the original charter was conceded in that case

See Louisville L. S. L. Railway vs Wilson, 11 Sup. U. S. 402 consent decree is not Resjudicata—c ses cited. Now in Humphreys vs. Pegues, it was conceded that the road was built after the act of 1863 and no claim was made that the constitution of 1868 repealed the exemption if any existed. It was also conceded that if the act of 1855 was part of the Northeastern charter, then the C. & D. got an exemption. These concessions are all denied here, and are the points on which this case must turn if the State is held to have been a party there, and not having been litigated in that, and this being on different causes of action, the estoppel does not apply.

In the case of Alsobrook vs. Wilmington, etc., R. R. Co., the facts were as follows on the point in question: The Halifax & Weldon Road was incorporated as Wilmington & Raleigh Road in 1835 with an exemption. The Halifax and Weldon built its road, the Wilmington & Weldon built to Halifax and under a statute permitting it, the Halifax & Weldon subscribed all its stock, etc., to the W. W. and the shareholders became stockholders in the W. W., and the road became part of the W. W. and claimed its exemption. The statute authorizing saie consolidation says that all the property of the H. & W. shall vest in and be owned by the W. W. & W. "And held and possessed by said Company in the same manner that all other property, real and personal, which has been acquired by the said Company is owned, held and possessed, and the road which may have been built, or partly built by the Halifax and Weldon Railroad Company, shall henceforth be deemed to all intents, civil as well as criminal, a part of the Wilming-

ton & Raleigh Road." In 1869 the State attempted to collect tax on the Halifax & Weldon Road, and the W. & W. got an injunction, Reid vs. R. R. Co., U. S., and restrained the sheriff from collecting tax on the road. This was an action to collect among other things tax on the Halifax & Weldon part, and the former judgment was relied upon. The Court says, 13 Sup. Ct. Rep. 79: "These proceedings (referring to Railroad Co. vs. Reid) are relied on as an estoppel so far as the road from Halifax to Weldon is concerned." "We think they cannot be so regardad. The causes of action are not identical, and the points or questions actually litigated are not the same. The distinction between the road from Halifax to Weldon and the main road from Wilmington to Halifax was not adverted to, and even if that question might have been raised, this suit being upon a different cause of action, the judgment in the former case cannot operate as determining what might have been but was not—"brought in the issue and passed upon." See same case 14 S. E. R. 652, (State Ct.)

In the case of Nesbit vs. Independant District of Riverside, 12 Sup. Ct. Rep., 746, the suit was on five bonds of $500 each, being Nos. 14, 12, 16, 17 and 18. The same plaintiff had prior to this brought suit on the interest coupons of bonds Nos, 14 and 15 and succeeded. The defence in each case was that more than the amount of bonds allowed to be issued had been issued, and that plaintiff bought the bonds with notice of the fact.

The defendant in the former suit failed to prove the notice to plaintiff and the Court held that plaintiff was a bonafide holder of the said bonds without notice.

In the second case this was relied on as an estoppel by res. adjudicata. The Court says: "By the rule laid down in Cromwell vs. County of Sac, the judgment in the suit at DesMoines is conclusive in this case only as to the matters actually litigated determined. What were they? The defense pleaded was this: that at the time the bonds were issued the indebtedness exceeded 5 per cent and the bonds were thereupn void. That the district received no consideration, and that the plaintiff was not a bonafide holder. The judgment entry shows that it appeared from the evidence that the indebtedness at the time the bonds were

issued exceeded the constitutional limitation of 5 per cent. but that it was adjudged that the recitals in the bonds estopped the defendant from showing this fact against the plaintiff. In other words, that which was determined was the effect of the recitals.

But this case does not turn upon that question at all, and nothing was determined here antagonistic to the adjudication there.

"An additional fact, that of notice from the amount of bonds purchased, was proved." Suppose two negotiable promisory notes, issued at the same time, as part of the same transaction,. In a suit on the first, brought by a purchaser before maturity, the maker proves facts constituting a defence as against the payee, but fails to bring home notice of these facts to the holder before his purchase. The judgment must go in favor of the holder, for the words of negotiability in the note preclude the maker from such a defense as against him. In a suit on the second of such notes, may not the maker couple proof of notice to the holder with that of the original invalidity of the note, and thus establish a complete defence against the holder? Is he precluded by the first judgment, and his failure in that to prove notice to the holder? That is precisely the case.

In the suit at DesMoines no notice to the holder was shown. "The recitals cut off the defense pleaded of original invalidity." In this action notice is proved, and additional fact is put into the case, which makes a new question. The one question was litigated and determined in the DesMoines suit; the other is presented here, surely an adjudication as to the effect of one fact above does not preclude in the second suit, an inquiry and determination as to the effect of that fact in conjunction with others." Those were actions on contract, and the defenses were no contract for want of certain legal requisites. In the first case it was held to be binding, the party ffghting the contract having failed to prove the facts overthrowing it. In the second case, between the same parties, they were allowed to prove the additional fact, and overthrow the contract. Here in Humphrey vs. Pegues, the action was on contract. The defense was no contract in the ground that the act of

1855 was not part of the charter of the Northeastern when the act of 1863 was passed, held that it was part of the charter and hence there being no other defense put up, there was a contract. In the case at bar the same contract is relied on, and we attack it on the ground that there was no consideration, in that the road was built prior to 1863, and the grant if any, was a gratuity, and was repealed by the constitution of 1868. This is a new fact and a new question in an action on a different cause of action. We attack the elleged contract further, on the ground that the word relied on to convey an exemption will not convey it, this was not a question in the Humphrey suit, and as the Court says in Nesbit vs. Districtsupra: "Here an additional defense is that the five bonds in suit, themselves created an over issue." That question was not presented in the Des Moines suit, and could not have been adjudicated. It is presented for the first time in this case. It is of itself a valid defense, irrespective of prior indebtedness.

So we have in this case a new question not presented in the Des Moines suit, the existence of facts never called to the attention of the Court in that case, which of themselves create a perfect defense. This was held, although the bonds were actually in evidence in the first case, or at least in Court, in the hands of plaintiff's counsel but the facts and questions were brought to the Court's attentian, and relied on. Now in this case the question of the extent of the word privileges was not raised at all. So that question is still open. The leading case on this point is the case of Cronwell against County of Sac. 49, U. S. 351. L. Coop. Ed. Bk. 24, page 198-200, cited fully and approved in Willoughby vs. R. R. Co., 52 S. C. 172. It lays down the rule as follows: "But when tne second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted upon the determination of which the finding or vedict was rendered. In all cases therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action, not what might have been thus litigated and determ-

ined. Only upon such matters is the judgment conclusive in another action."

To show that the rule in South Carolina is that the question must have been adjudicated in a former suit in order to estop the parties from making it in the subsequent proceeding, we cite first, Henderson vs. Kenner, 1 Rich. Law S. C., page 474.

"Where the plerdings in a case make single questions, to which the verdict directly applies, the verdict is per se conclusive between the parties, as to the matters decided by it. But where the pleadings present two or more distinct propositions, and the verdict may be referred to either, both or all, it is not conclusive, but only prima facie evidence, on any one of the questions, and may be rebutted by evidence aliunde."

This case also decides that parol evidence may be introduced to prove what was actually decided. We cite again the case of Hart vs. Bates, 17 S. C., page 35, which discusses fully these questions and is the leading case in South Carolina on this question:

"The doctrine of 'res judicata' is very far-reaching and effective. It is founded on prsnciples of the wisest policy, because the peace and order of society require that a matter once litigated should not again be drawn in question between the same parties or those claiming through them. But whilst it is important to maintain the principle in all its integrity, it is no less important that it should be clearly defined and kept within its proper limits. All agree as to its utility and necessity, but there has been difference of opinion as to its precise limits and its application in particular cases.

As we understand it, the rule established in the Duchess of Kingston's case is, "first, that the judgment of a Court of competent jurisdiction, directly on the point, is as a plea in bar or as evidence conclusive between the same parties upon the same matter directly in question in another court; secondly, that the judgment of a court of exclusive jurisdiction directly upon the point is in like manner conclusive upon the same matter between the same parties coming incidentally in question in another court

for a different purpose. But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which comes collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment." 2 Smith's Lead. Cases 424, and notes. It seems, therefore, that to make out the defence at least three things are necessary; the parties must be the same, or their privies; the subject-matter must be the same, and the precise point must have been ruled."

I cite also the case of Jones vs. Massey, 14 S. C., p 307, where they entertain a second appeal because the difference between rental value and rents and profits had not been called to the attention of the Court on a former appeal in the same case:

If we were not reluctant to shut off inquiry we would hold that the proper principle of the accounting had been adjudged by this Court to be for 'rents and profits,' and not for 'rental value.' This Court, in both of its judgments pronounced by the same judge, so expressed its view in words, and, in the last, particularly declared that the account for the slaves and the land should stand 'on the same grounds.' But the precise difference between 'rents and profits' and 'rental value,' had not been argued before this Court, and as we are inclined to the opinion that the words 'rents and profits' in the judgments, were used in their general sense, we entertain that point now as for the first time before this Court."

We cite also the case of Duren vs. Kee, 41 S. C., page 174, on the same question where the former action was limited by the charge of the judge for finding on one issue, and it was held in the subsequent action that the other issues raised in the pleadings were not concluded thereby, although the finding was made general by the jury:

"It seems to us manifest that the seeming confusion in this case arises from the supposed necessity of considering in every case that the verdict must be considered as a general verdict, responsive alone to the issues of the pleadings; and that therefore, the verdict in this case, "we find for the defendant" is a general verdict in her behalf as to

the whole issues made by the pleadings, without any reference whatever to the charge of the trial judge. It may be admitted that, as a general rule, a verdict endorsed on the record must be considered as responsive to the issues made in that record. But there are well established exceptions to that rule. There are cases where the charge of the judge upon the law involved must be taken into the account, in giving a proper interpretation to the verdict. Here, in the first first case between these parties, the trial judge formally and officially stated, more than once, as follows: "From the evidence in the case, the argument and contention of counsel, and the charge I gave the jury, the inquiry was confined to the question whether the defendant could retain her present pedis possessio, or not." Then from this, we certainly know as a fact that the verdict, "we find for the defendant," was intended to have reference to that inquiry and nothing else. That being the case, is there any principle or rule of law which requires us to ignore what we clearly know to be the truth, and to darkly infer a different interpretation—that the verdict mast have been "a general verdict" upon all the issues originally made in the complaint and answer. This possibly might be so, if the information of Judge Wallace, as stated by him, had been correct, viz: that after the verdict had been pronounced, the trial judge (Hudson) gave his opinion merely, that only one issue, i. e., that as to the pedis possession, had been decided, and, therefore, he made a statement to that effect upon one of the plats which had been used at the trial. But, as we understand the record, the statement was not precisely correct, especially as to the time when the trial judge limited the inquiry to the pedis possessio. He says himself, in the report of the case for the Supreme Court, that it was done during the trial of the case, in his charge to the jury, and, therefore, that limitation must have entered into, and indeed formed the verdict, which, properly construed, should read, "we find for the defendant only as to the pedis possessio." That is the proper construction of the verdict.

We cite further the case of McMakin vs. Fowler, 342 S. C., at page 286, in which it is again held, summing up all of the authorities on the subject, that only the questions

actually decided are concluded and those questions can be determined by introduction of parol evidence;

'We proceed, then to consider the question whether parol evidence was admissible in this case to show what were the issues passed upon in the former action. While it is undoubtedly true that a verdict with judgment entered thereon is conclusive, so far as the parties to the record and their privies are concerned, as to all matters or issues decided by it, yet the question often arises as to what issues were decided, and when this is the case, while we must look primarily to the pleadings to ascertain what were the issues thereby made and decided, yet they are not necessarily conclusive, for, as is said by Evans, J., in Henderson vs. Kenner, 1 Rich., at page 479: "If these (the pleadings) make single questions, to which the verdict directly applies, then the parties are concluded, and the same matter can never, as between them, be inquired into again." But on the same page he adds, "Where the pleadings are general, and there is more than a single proposition to be decided, and the verdict may be equally applied to both or all, in such case a verdict has not that conclusiveness which belongs to it when applied to a single proposition stated in the pleadings." And on the next page that eminent judge states, as the rule resulting faom all the authorities on the subject, "that where the pleadings present two distinct propositions and the verdict may be referred to either, it is inconclusive because there is no precise issue made by the pleadings, and the verdict wants that certainty which is necessary to give it the effect of an estoppel. In such case, as the jury may have decided on both questions, the verdict is prima facie evidence, but it is not conclusive, and may be rebutted by evidence aliunde. Such evidence is not resorted to, to contradict or explain the verdict by any direct evidence of intention; but to give it application by showing what were the facts to which it applied and upon which the jury passed in rendering it. There are many cases in which parol and extrinsic evidence may be resorted to to show the effect of a verdict."

III.

The State cannot be estopped by a judgment against its

officers or by any judgment where it has not voluntarily submitted to the jurisdiction as a result of legislative authority (except of course in an original proceeding in the United States Supreme Court) and to hold that a judgment against two tax collectors represented by the Attorney General bound the State so that her attorneys could not be allowed to contend in Court for her rights would be subjecting every State to the process of every Court which could get personal jurisdiction of her officers as effectually as if she could be sued in her own name. We cite XI Amendment to the United States Constitution as follows:

"The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens or subjects of any foreign States. So that if they say Pegues was indirectly suing the State, we reply that the Court was utterly without jurisdiction and the judgment was no estoppel. See Anderson vs. Cave, 49 S. C., 505. If they say the State was in privity with the defendant and he was the State's agent, we say that they are trying to do indirectly what they couldn't do directly, to-wit: To bind a State by a judgment against its agent when they could not do it by judgment against the State itself. (We deny the privity also) but we have high authority for the position that a judgment against the agent of a State is not an estoppel as to the soverign. In U. S. against Clarke, 8 Peters 444, it was held that the United States could not be sued. The Court saying: "They cannot be subjected to legal proceedings at law or in equity without their consent, and whoever institutes such proceedings must bring his case within the authority of some act of Congress." This was cited and followed in "The Siren," 7 Wall. 152, 1868, and in "The Davis," 10 Wall. 15, 1869, and on this ground the Court held in Carr vs. United States, 8, otto, 433, that a judgment against the agent of the United States was not an estoppel as to the United States. In that case the dispute was to a title to certain lots in SanFrancisco. There have been two actions on on the subject. In 1857 an action was brought against the Marshall of the District of California for ejecting the plaintiff from said lots. He justified under an order of President Pierce requiring him to do so. The jus-

tification was overruled and judgment had against the Marshall. In 1865 the second action was brought in ejectment by the grantee of Carr, Dft. in this action against one Hastings to recover possession of the lot. Hastings, et. al. pleaded that the premises were the freehold of the United States, and that they, as its officers and employees and by its authority, entered & C. "The question of title was gone into and decided against the defendants." The District Attorney for the United States appeared for defendants and defended as did also an attorney specially employed and paid by the Secretary of the Treasury. Then this action was begun by the United States to settle the title to the property. The above judgments were set up as Res Judicata, and it was held that a judgment against the officers and agents was no estoppel as to the soverign. The Court says: "It may be contended that the United States consented to have its title determined in these cases, and that such consent was manifested by the employment of the District Attorney and additional counsel to aid in the defense, but we do not think that any such inference can be deduced from the action of the Secretary of the Treasury. "He may have deemed it prudent to assist the officers who were used, without intending to waive any rights of the Government. And in fact he had no authority to waive those rights. In England it is usual for the proper officer to consent in Court that it may take jurisdiction of the matter. This consent is given by authority of the King, who thus submits to be sued in his own Court. The liberal exercise of this authority there removes the difficulty presented here," (Where no power to do this exists in any officer of the Government, and in fact he had no authority to waive those rights) and prevents any opportunity of gross injustice in such cases in England." The appellant contended that the answer setting up tenancy and agency coupled with th5 appearance of the U. S. attorneys made the U. S. virtually a party." That by the law of California judgment in ejectment is an estoppel and that where a tenant, or other person in privity with the landlord is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action. Whilst we concede that this may be the law of California as regards private citizens who are landlords,

we are not satisfied that the same law can be applied to the Government of the United States. We consider it to be a fixed principle that the Government cannot be sued except by its own consent; and certainly no state can pass a law which would have any validity for making the government suable in its own Courts."

"Without discussing the matter further, we are clearly of the opinion that the judgments in the cases relied on by appellant constitute no estoppel against the United States." Now we have here a judgment relied on in which the most that can be contended for is that it was against an agent of the Soverign and defended by the Sovereign's Attorney General, and they ask that the Sovereign be estopped thereby. We say that in this case the U. S. Constitution inhibits expressly the jurisdiction of the Court rendering the judgment, if the State was a party, that no legislative consent was given, that the Attorney General could not consent and, therefore, the State was no party to the case, and cannot be. See Tindal vs. Wesley, 167 U. S., 204. As to the power of Attorney General to waive anything for the State, see Commissioners vs. Rose, 1 Des., 461, where a compromise made by an attorney general of South Carolina made and carried out was disregarded for the reason that he had no authority to waive anything for the State, or make compromises without Legislative authority."

The Attorney General claimed no right to waive the State's rights nor did the Legislature accord him that right or ratify his acts. See his report.

IV.

There is plain and adequate remedy at law, there being the express provision that demand should be made and if the taxes were not paid, suit should be brought at law, which suit was brought and to which suit the Atlantic Coast Line Railroad Company plead. Now if the plea of former adjudication is good, it can be set up as a defence and fully availed of and the Court of equity could not interfere—a case in point is Scottish & U. N. Ins. Co. vs. Bowland 196 U. S., 611.

"As to the question of personal liability of the insurance company to judgment in an action brought to recover the amount of the taxes, we think the Court should not have issued an injunction, as was done, against the prosecution of civil suits for this purpose. If there is no personal liability for these taxes,—a point which we do not feel called upon to decide,—it is perfectly clear that, if service could be had which would make a personal judgment proper, the company could set up its defense by answer in the action at law, and there is no necessity to resort to a court of equity for relief. It will be presumed, if the claim of the company is right, no personal judgment will be rendered against it, and, if its theory of the controversy is correct, no such judgment can be lawfully rendered. In such case the authorities are uniform that equity will not interfere by injunction, but leave the party to his defense at law.

U. S. Rev. Stat. par. 723, U. S. Comp. State 1901, p. 583.
Phoenix Mut. L. Ins. Co. v. Bailey, 13 Wall. 616-523, 20 L. Ed. 501-503.
Grand Chute v. Winegar, 15 Wall. 373, 21 L. Ed. 174.
Deweese v Reinhard, 165 U. S. 386, 41 L. Ed. 757, 17 Sup. Ct. Rep. 340."

This position it seems to us is fatal to the petitioners cause here. In addition to that equity only interferes to prevent trespass on the property or interference with the operations of the party invoking its aid and nothing of that kind was contemplated or possible here.

In Penoyer vs. McCannoghy, 140 U. S., 1, the Court specifying the class of cases in which injunctions are granted against State officials says "Such suit in a proper case, where the remedy at law is inadequate to prevent such wrong and injury is not within the meaning of the 11 amendment an action against the State," the Court defines the cases where it is and is not a case for injunction, and I cite the following from said case:

"It is well settled that no action can be maintained in any Federal Court by the citizens of one of the states against a state, without its consent, even though the sole object of such suit be to bring the state within the operation of the constitutional provision, which provides that

"no state shall pass any law impairing the obligations of contracts." This immunity of a state from suit is absolute and unqualified, and the constitutional provision securing it is not to be so construed as to place the state within the reach of the process of the Court. Accordingly, it is equally well settled that a suit against the officers of a state to compell them to do the acts which constitute a performance by it of its contracts, is, in effect, a suit against the state itself. In the application of this latter principle, two classes of cases have appeared in the decisions of this Court, and it is in determining to which class a particular case belongs that different views have been presented. The first class is where the suit is brought against the officers of the state, as representing the state's action and liability, thus making it, though not a party to the record, the real party against which the judgment will so operate as to compell it to specifically perform its contracts.

In re Ayers, 123 U. S. 443, 8 Sup. Ct. Rep. 164.
State v. Jumel, 107 U. S. 711, 2 Sup. Ct. Rep, 128.
Antoni v. Greenhow, 107 U. S. 769, 2 Sup. Ct. Rep. 91.
Cunningham v. Railroad Co., 109 U. S. 446, 3 Sup. Ct. Rep. 192, 609.
Hagood v. Southern, 117 U. S. 52, 6 Sup Ct. Rep. 608.

The other class is where a suit is brought against defendants who, claiming to act as officers of the State, and under the color of an unconstitutional statute, commit acts of wrong and injury to the rights and property of the plaintiff acquired under a contract with the state, whether brought to recover money or property in the hands of such defendants, unlawfully taken by them in behalf of the State, or for compensation in damages, or, in a proper case where the remedy at law is inadequate, for an injunction to prevent such wrong and injury, or for a mandamus, in a like case, to enforce upon the defendant the performance of a plain, legal duty, purely ministerial, is not, within the meaning of the eleventh amendment, an action against the State.

Osborn vs. Bank, 9 Wheat., 738.
Davis vs. Gray, 16 Wall, 203.
Tomlinson vs. Branch, 15 Wall, 460.
Littlefield vs. Webster Co., 101 U. S., 773.

Allen vs. Railroad Co., 114 U. S., 311,
5 Sup. Ct. Rep., 925. 962.
Board vs. McComb, 92 U. S , 531.
Poindexter vs. Greenhow, 114 U. S., 270,
5 Sup. Ct. Rep., 903, 962.

It is not our purpose to attempt a review of all, or even many, of these decisions, as to do so intelligently would unnecessarily protract this opinion, and, in this connection, would subserve no useful purpose. It will be sufficient, perhaps, to refer to some of those which this case most nearly resembles."

In United States vs. Ricket, 23 Sup. Rep., 483 U. S., the Court recognizes the rule that plain and adequate legal remedy will prevent the resort to equity.

When the legal remeds is plain and adequate, no injunction will lie to prevent collection of taxes, We cite the following on this point:

Where there is a plain and adequate remedy at law tax will not be enjoined. We cite,

Indiana Mfg. Co., 50 Koehn, 188 U. S., 681.
Peoples Nat. Bank vs. Mnys, 107 Fed., 570, Va. case.
Douglas vs. Stone, 110 fed., 812, (Va.)
City of Carrington vs. First Nat. Bank, 103 f., 523.

V

It is admitted by the last decree that some of the taxes sued for are due, hence no injuncton can lie in the case, the part that is due not having been tendered. We cite Carrington vs. First Nat. Bank, 103, f. 524.

We refer also to W. U. Tel. Co. vs. Missouri, 23 Sup. Rep. at page 734. This was a case where the defendents desired to defeat the collection of the tax on the ground of excessive levy having tendered the part admitted to be due and the Court says:

"That such questions can only be raised by a direct attack, in equity, and then only upon the condition precedent that it pays or tenders the amount justly due and only asks to have the collection of the excess restrained. This the defendant has not done in this case. It simply

alleges a discrimination or excessive tax, and then seeks to defeat the whole assessment without paying or tendering anything, notwithstanding it admits by its answer and its answer and its proofs that it has property in this State subject to taxation of the value of $541,472.40. Upon the cases relied on by it, this cannot be done."

VI.

The sixth contention, if solved in favor of the Appellants, renders unnecessary the consideration of the others. It is, that Appellants are merely attorneys for and agents of the State of South Caaolina without any personal interest in the cause and without any intention of committing any trespass upon the property or rights of the petitioner, merely prosecuting a suit at law to recover a debt alleged to be due the State, in which suit all the defences set up here by the petitioner may and have been set up. That to enjoin all the State's counsel from prosecuting her suit is to enjoin the State from so doing, and the Court is without power to do so. In the case of Chandler vs. Dix, 194 U. S., 590, the Court says:

"It is obvious, without going further, that the bill cannot be maintained. The auditor general and county treasurer claim no interest in the land, and have none in the question whether the State's title is good. The State's title, so far as appears, is the only one assailed. The State therefore, is a necessary party (Burrill vs Auditor General, 46 Mich. 256, 9 N. W. 273; and, as this suit cannot be maintained against a State, the bill so far as it seeks to have tax sales declared void, must be dismissed, whether it be admitted that Michigan is not represented, or be said that it is represented by the auditor general. The plaintiff relies upon the Public Acts of Michigan, 1899, act 97, adding par. 144 to the general tax law of 1893. That act provides that "the auditor general shall be made a party-defendant to all actions or proceedings instituted for the purpose of setting aside any sale or sales for delinquent taxes on lands held as State tax lands, or which have been sold at annual tax sales, or for purpose of setting aside any taxes returned to him and for which sale has not been made." But we are of opinion that if the foregoing words otherwise would apply to this case, they should not be con-

strued as expressing a waiver by the State of its constitutional immunity from suit in a United States Court."

Now the State is entitled to the taxes in dispute. It cannot be decided as to her if she is not before the Court, and if she is before the court in the person of her attorneys this court is without power to render judgment against her.

In International Postal Supply Co. vs Breece, 194 U. S. court says:

"It was pointed out that the defendant had no persona interest in the continuance of the use, and that, so far as the injunction was concerned, the suit really was against the United States. Of course if those defendants were enjoined, other persons attempting to use the caisson gate would be, and thus the injunction practically would work a prohibition against its use by the United States."

So here if Appellants are enjoined, their successors and such other counsel as the State employes, will be enjoined and a prohibition against the State's prosecution of its suit will result.

The injunction was not only a violation of the XI Amendment to the Constitution but of Section 720 Statutes of U. S.

This has been held to extend to enjoing officers of the State Court. See Diggs vs. Walcott, 4 Branch 179.

In Peck vs. Jenness, 7 Howard 624, the Court says: "The fact therefore, that an injunction issues only to the parties before the Court and not to the Court is no evasion of the difficulties that are the necessary result of an attempt to exercise that power over a party who is a litigant in another and independent forum." The acts of Congress of the 2nd. of March; 1793, Ch. 66, Snc. 5, declares that a writ of injunction shall not be granted to stay proceedings of any Court of a State." Approved in Watson vs. Jones, 16 Wall, 673.

In Haines vs. Carpenter, 91 U. S., 254, the Court says: "In the first place, the great object of the suit is to enjoin and stop litigation in the State Courts, and to bring all the litigated questions before the circuit court. This is one of

the things which the Federal Courts are expressly prohibited from doing."

In Deal vs. Reynolds, 26 U. S., 340, the Court says: "The grava-men of what is desired as to Reynolds is an injunction to prevent his proceeding at law in the State Court- Without this all else is of no account. Any other romedy would be unavailing. Such an injunctin no Court of the United States can grant." To the same effect are Texas Pacific Rwy. vs Kuteman, 13 U. S., C. C. A. Reinoch vs. R. R. Co., 53 Fed., Rep. 33; Chicago Bank vs. Benty, 59 Fed., Rep. 645; Fall vs. Saybrook, 66 Fed. Rep 339. Now if they were attempting to enjoin the State directly they could not do so for two reasons.

1st. The Court could not entertain a suit against the States and 2nd., it is plainly within the prohibition of Rev. Stat. S. 720.

Can they enjoin indirectly by enjoining the Attorneys of the State? We submit that they cannot, because—1tt. The attorneys are the officers of Court by means of whom the case must proceed if at all and if they should be enjoined and all the attorneys were enjoined from proceeding with the case, the case in the State Court would be as effectually enjoined as if the plaintiff were itself enjoined from proceeding and indeed the injunction could act effectively to stop the State only on the Attorneys sought to be enjoined. So it would be a plain violation of Section 720, Rev. Stat.

It would in the next place, be an action or proceeding against a State which cannot be maintained. This is held in many cases. In Belknop vs. Schild, 161 U. S. 10, it is held as follows:

"But no injunction can be issued against officers of a State to restrain or control the use of property already in possession of the State, or money in its treasury when the suit is commenced as to compel the State to perform its obligations or where the State has otherwise such an interest in the object of the suit as to be a necessary party." This is a proceeding to compel the State to perform its obligations if it is anything, and is against officers of the State. In Cunningham vs. Railroad Co. 108 U. S., 446,

the Court says: "It may be accepted as a point of departure unquestioned that neither a State nor the United States can be sued as defendant in any Court in this coun try without their consent except in the limited class of cases which a State may be made a party, in the Supreme Court of the United States by virtue of the original jurisdiction conferred on this Court by the Constitution. The principle is conceded in all the cases, and whenever it can be clearly seen that the State is an indispensable party to enable the Court according to the rules which govern its procedure to grant the relief sought, it will refuse to take jurisdiction. In the case now under consideration the State of Georgia is an indispensable party. It is, in fact, the only proper defendant in the case. No one sued has any personal interest in the matter or any official authority to grant the relief asked." Again in Belknop against Schild, Supra. The Court after stating that where a tax collector is proceeding under a void statute to distrain personal property for taxes he can be sued for trespass or if the legal remedy was not adequate he can be enjoined, the taxpayer having tendered coupons in payment which were refused.

But where the Circuit Court of the U. S. at the suit of one who had tendered such coupons in payment of taxes issued an injunction against the attorney general and the attorneys of the State of Virginia to restrain them from bringing an action in behalf of the State to recover such taxes, and upon their bringing such actions, committed them for contempt in disobeying the injunction, they were discharged by this Court on writs of Habers Corpus. Mr. Justice Mathews again delivering its opinion and fully reviewing the previous cases said that the decision in Cunningham vs. Railroad Co. above cited, applied, "The rule is that when it is manifest upon the face of the record that the defendants have no individual interest in the controversy and that the relief sought against them is in their official capacity as representatives of the State, which alone is to be affected by the judgment or decree the question then arising, whether the suit is against the State, is one of jurisdiction, and added that actions had been sustained against officers acting in behalf of the State, only in those instances where the act complained of, considered

apart from the official authority alleged as to it justification, and as the personal act of the individual defendant constituted a violation of rights for which the plaintiff was entitled to a remedy at law or in equity against the wrong doer in his individual character and that the eleventh amendment of the Constitution decreeing that the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another State or by citizens or subjects of any foreign state must be held to cover not only suits brought against a State by name, but those also against its officers agents and representatives where the State, though not named as such, is nevertheless the only real party against which alone in fact the relief is asked, and against which the judgment or decree effectively operates" and therefore, concluded that the suit in which the injunction was granted was in substance and in law a suit against the State of Virginia and consequently the Court was without jurisdiction to entertain it, the order of injunction and the commitments for contempt were null and void and the imprisonment of the officers was without authority in law. In re, Ayers 123 U. S. 443.

The case of Ayers cited is an exact parallel of ours and covered by it.

The case of Fitts vs. McGee, 12 Sup. Ct. 274 ,172, U. S. 516, also puts the case clearly thus: "To secure the manifest purposes of the constitutional exemption guaranteed by the eleventh amendment requires that it should be interpreted not literally and two narrowly, but fairly, and with such breadth and largeness as to accomplish the substance of its purpose, in this spirit it must be held to cover not only suits brought against a State by name, but those also against its officers, agents and representatives where the State though not named as such is nevertheless the only real party against which alone in fact the relief is asked and against which the judgment or decree effectually operates." * * "There is a wide difference between a suit against individuals holding official positions under a State to prevent them under a sanction of an unconstitutional statute from committing by some positive act a

wrong or trespass, and a suit against officers of a State hereby to test the constitutionality of a State statute, in the enforcement of which those officers will act only by formal judicial proceedings in the Courts of the State." * * Under the view we take of the question, the citizen is not without effective remedy when proceeded against under a legislative enactment void for repugnancy to the supreme law of the land for whatever form of proceeding against him he can make his defense upon the ground that the statute is unconstitctional and void. And that question could be ultimately baought to this Court for final determination."

We think this covers the case fully.

The Appellants represent no personal interest but any action will affect the State alone. They contemplate no personal trespass or act for which an action of damage would lie around them personally. The petitioner has the right to all the benefit it is entitled to from the decree in Pegues vs. Humphreys in the judicial proceedings already instituted by them and can carry it to Court of last resort of the United States. It is a mere judicial meeting to test the liability for taxes and the State cannot be enjoined from so proceeding by enjoining the attorneys:

In Ex Parte Ayer cited adove the situation was exactly the same.

And the case was held to be one against the State, void for want of jurisdiction and the commitment for contempt was set aside.

I will now notice one of the contentions of the petitioners:

1st. They claimed in the Circuit Court that while the Court ordinarily will not enjoin when there is adequate remedy at law, still in an ancilliary proceeding it will be done. We contend that an ancilliary proceeding can only be based on a valid adjudication and if the original judgment is not effective against the State and its attorneys the ancilliary proceedings will not be effective either.

STEVENSON & MATHESON,
For Plaintiffs in Error.

W. J. Stevenson